Question Presented

At the time petitioner was tried, was there "cause" for not raising a claim based upon arguments later accepted in *Penry* v. *Lynaugh*, No. 87-6177 (June 26, 1989); and if not, would the application of a procedural bar to the claim result in a "fundamental miscarriage of justice," *Smith* v. *Murray*, 477 U. S. 478 (1986)?

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

JOHN HENRY SELVAGE,

Petitioner,

vs.

JAMES LYNAUGH, Director,
Texas Department of Corrections,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF AMICUS CURIAE OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

INTEREST OF AMICUS

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest.

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1. CJLF has received written consent of the parties to file this brief.

CJLF seeks to bring the due process protection of the accused into balance with the rights of the victim and of society to rapid, efficient and reliable determination of guilt and swift execution of punishment.

The present case involves a collateral attack on a final judgment based on a claim which defendant did not mention at trial or on appeal and which is not a bedrock rule of fairness. Such unnecessary attack on the finality of criminal judgments is contrary to the rights of victims and society which CJLF was formed to advance.

SUMMARY OF FACTS AND CASE

On July 26, 1979, petitioner John Henry Selvage and his accomplice Wilbur Kelly robbed a convenience store in Houston. One of the robbers, it is not known which, shot a customer to death. Brief for Petitioner ("Pet. Brief") 9-10.

Four days later, Selvage and Kelly robbed Ventura's Jewelry in Houston. One of them shot and killed Deputy Sheriff Al Garza. Although off duty, Garza had prominently displayed his badge prior to the shooting. It is not known which robber fired the fatal shot. *Id.*, at 7. After the shooting of Garza and while they were fleeing the scene, both robbers shot at Stephen Ventura, the owner of the store. *Id.*, at 5-6. Selvage was convicted of the murder of Deputy Garza.

In the penalty phase, the prosecution presented evidence of the convenience store robbery and murder, of Selvage's prior record of drug possession and conspiracy to commit bank robbery and of his attempted escape from jail. *Id.*, at 8-10. The defense presented evidence of Selvage's good upbringing, of the apparently detrimental effect of his military experience and of his potential for rehabilitation. *Id.*, at 10-12.

The jury was instructed on the two relevant Texas special issues, which focus first on deliberateness and expectation that death will result and second on future dangerousness of the defendant. J. A. 4. The jury answered both issues "yes," *ibid.*, and Selvage was accordingly sentenced to death. On direct appeal to the state's highest criminal court, the judgment was affirmed. *Selvage* v. *State*, 680 S. W. 2d 17 (Tex. Crim. App. 1984).

Defense counsel did not accept the instruction in the bare words of the statute as given. He specifically requested a supplemental instruction to the effect that a non-triggerman was completely exempt from capital punishment. J. A. 5-6. At no time during trial or direct appeal, however, did the defense claim that the instructions were deficient for not allowing mental condition or accomplice status to be considered as mitigating factors. See J. A. 30-32; *Selvage* v. *State*, *supra* (enumerating the grounds of error claimed). The trial was conducted approximately two years after *Lockett* v. *Ohio*, 438 U. S. 586 (1978) and two years before *Eddings* v. *Oklahoma*, 455 U. S. 104 (1982). The appeal was decided two years after *Eddings*.

In 1985, seven years after *Lockett*, Selvage filed a habeas corpus petition in the federal district court. J. A. 70. This petition made no claim that the jury had not been permitted to consider mitigating factors. J. A. 46. The petition was denied, and the denial was affirmed. J. A. 70.

On March 3, 1987, while federal proceedings were pending, Selvage filed a state habeas petition, which was denied. J. A. 9. On March 22, 1988, ten years after *Lockett* but a year before *Penry* v. *Lynaugh*, 109 S. Ct. 2934, 106 L. Ed. 2d 256 (1989), Selvage filed a state habeas petition raising for the *first* time the mitigation issue. The state trial court found the issue procedurally barred, J. A. 34-35, and the Court of Criminal

Appeals adopted the trial court's findings and conclusions. J. A. 38.

On Selvage's second federal petition, the state objected to the mitigation question on grounds of both abuse of the writ, J. A. 45-50, and procedural bar, J. A. 51-52. The district court dismissed this claim but granted a stay on another claim. J. A. 63-66. The Fifth Circuit Court of Appeals vacated the stay. Although anticipating the holding of *Penry*, *supra*, that the instructions might be found deficient, the court held that the claim was procedurally barred. J. A. 81; *Selvage* v. *Lynaugh*, 842 F. 2d 89, 95 (5th Cir. 1988).

SUMMARY OF ARGUMENT

Selvage contends that he had "cause" not to raise his claim earlier, thus permitting consideration on federal habeas, because his claim was "novel" at that time within the meaning of *Reed* v. *Ross*, 468 U. S. 1 (1984). This contention cannot be reconciled with this Court's decision in *Penry* v. *Lynaugh*, 109 S. Ct. 2934, 106 L. Ed. 2d 256 (1989) that the decision in *Penry* did not announce a "new" rule within the meaning of *Teague* v. *Lane*, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989).

The degree of change from prior precedent which is required for "novelty" as "cause" under *Reed* is substantially *greater* than the degree of change which invokes the nonretroactivity bar of *Teague*. Therefore, absent one of three exceptions not present in this case, *Reed* is a dead letter after *Teague*. Any claim which is sufficiently novel that counsel did not even have "the tools to construct" it at the time of trial must necessarily not be "dictated by precedent existing at the time."

The "fundamental miscarriage of justice" exception, in order to fulfill its function, must be based on an undeniable

injustice of the result and not on the procedure by which that result was obtained. Where guilt is not in question, the penalty-phase application of this exception should be limited to those grounds on which there is an overwhelming national consensus against capital punishment.

I. Stability and clarity are desperately needed in the procedural default area.

The procedural default rule has a long and uneven history in this Court. Impatience with petitioners who omit claims at trial and on appeal and then raise them on federal habeas corpus can be seen as far back as *In re Wood*, 140 U. S. 278, 288-289 (1891) and *Matter of Spencer*, 228 U. S. 652 (1912). "If defenses may be omitted at trials, rights of review omitted, and yet availed of through *habeas corpus*, the whole course of criminal justice will be deranged and, it may be, defeated." *Id.*, at 661.

Stare decisis has not fared well in this area, as this Court has swung from one extreme to the other. In *Brown* v. *Allen*, 344 U. S. 443, 485-487 (1953), this Court held with unmistakable clarity that the bar of procedural default was jurisdictional and mandatory as a corollary to the then-recently-codified exhaustion rule, admitting no exceptions other than incapacity or interference by the state. See also, *Fay* v. *Noia*, 372 U. S. 391, 461-462 (1963) (Harlan, J., dissenting). Yet *Brown* was overruled *sub silento* in *Fay* v. *Noia*, *supra*.

Fay swung to the opposite extreme, substantially abolishing the procedural default rule by limiting it to cases of "deliberate by-passing of state procedures." *Id.*, at 439. Yet as applied in Noia's case, this rule was no rule at all. Noia had intentionally decided not to appeal. He said it was to avoid financial burden to his family; his lawyer said it was to retain the benefit of his

lenient sentence of life. *Id.*, at 396-397, n. 3. Either way, it is difficult to conceive of a bypass more deliberate.

In a series of decisions since *Fay*, this Court has applied a "cause and prejudice" test to defaults occurring before, during and after trial. *Francis* v. *Henderson*, 425 U. S. 536 (1976) (no challenge to grand jury composition); *Wainwright* v. *Sykes*, 433 U. S. 72 (1977) (no contemporaneous objection to evidence at trial); *Murray* v. *Carrier*, 477 U. S. 478 (1986) (omission from appeal). Although not explicitly overruled, there is nothing left of *Fay*'s deliberate bypass test. The cause and prejudice test now applies across the board. *Amadeo* v. *Zant*, 108 S. Ct. 1771, 1776, 100 L. Ed. 2d 249, 259-260 (1988).

The cause and prejudice rule of *Wainwright* v. *Sykes*, *supra*, is thus the resultant vector of two vehemently opposing forces. The law of procedural defaults has swung wildly to one extreme and then to the other and finally settled on a moderate course. The product of such a long and arduous battle should command special respect lest we begin the whole cycle again. The basic rule should not be so riddled with exceptions that the exceptions swallow the rule.

The *Sykes* rule has not been without its detractors. A criticism has been strongly voiced in recent months that the indefinite boundaries of the rule and its exceptions make the rule more complicated than the merits of the petition, delaying and complicating the habeas proceeding. Chief Judge Donald P. Lay of the Eighth Circuit expressed this view in recent hearings before the Senate Judiciary Committee.[2] The ABA Criminal Justice Section has voiced a similar criticism. ABA

2. November 8, 1989. As of this date there does not appear to be a published transcript of this testimony.

Criminal Justice Section, Report to the House of Delegates 24-26 ("ABA Report").[3]

There are three possible solutions to the complication of the rule: (1) abandon the rule and return to *Fay* v. *Noia*; (2) abandon the exceptions and return to *Brown* v. *Allen*; or (3) clarify the rule and limit the exceptions. The opponents of capital punishment naturally call for restoration of *Fay*. See Robbins, Rationalizing Federal Habeas Corpus Review of State Court Criminal Convictions in Capital Cases 71-73 (1989) (background paper for ABA Task Force). Others favor the third alternative. See Lucas, Minority Report of ABA Task Force Co-Chairman 11 (1989) reprinted in ABA Report, *supra*, A-2, A-12. Whatever may be the legislative outcome of this debate, the compelling *stare decisis* considerations discussed above point clearly to the third option as the path of judicial development.

The scope of the rule itself was significantly clarified last term. If the claim was presented to the state court, it is only barred if the state court makes a plain statement to that effect. *Harris* v. *Reed*, 109 S. Ct. 1038, 103 L. Ed. 2d 308 (1989). If not presented to the state courts, it is barred if state law clearly bars it. See *Teague* v. *Lane*, 109 S. Ct. 1060, 1067-1069, 103 L. Ed. 2d 334, 346-348 (1989). Habeas claims never presented to the state courts are not exhausted, however, unless "it is *clear* that [the] claims are now procedurally barred under [state] law." *Castille* v. *Peoples*, 109 S. Ct. 1056, 1060, 103 L. Ed. 2d 380, 387 (1989) (italics added). If a claim is not exhausted, the petition should be dismissed on that ground. *Id.*, at 1059, L. Ed. 2d at 385. The state court proceeding which follows dis-

3. This report bears no title other than the above; it is dated February, 1990, even though it was announced in a press release dated November 27, 1989. It is available from the ABA Criminal Justice Section, Washington, D. C.

missal for nonexhaustion should produce the plain statement required by *Harris*.

Other cases have done much to clarify what constitutes "cause." The quintessential "cause" is intentional concealment by state officials of the evidence underlying the claims. See *Amadeo* v. *Zant*, 108 S. Ct. 1771, 1777, 100 L. Ed. 2d 249, 260 (1988). Ineffective assistance of counsel is also cause. *Murray* v. *Carrier*, 477 U. S. 478, 488 (1986). However, the failure of effective counsel to recognize an available factual or legal basis for a claim is not cause. *Id.*, at 486. Neither is an inadvertent failure to raise the issue on appeal, *id.*, at 488, nor a deliberate tactical decision not to pursue a claim, *Smith* v. *Murray*, 477 U. S. 527, 534 (1986).

There remain three principal areas of confusion. The first is when a state procedural bar is not "adequate" despite a plain statement of the state court. The second is the use of novelty of the claim as cause. The third is the scope of the "fundamental miscarriage of justice" exception as applied to sentencing. This case involves the second and third issues,[4] and it can clear up much of the complexity and confusion.

II. Only genuinely new rules are sufficiently novel to constitute "cause" under *Reed v. Ross*.

The issue of novelty of the argument as "cause" under *Sykes* is bracketed by the decisions in *Engle* v. *Isaac*, 456 U. S. 107 (1982) and *Reed* v. *Ross*, 468 U. S. 1 (1984). Both cases involved claims that jury instructions had unconstitutionally shifted the burden of proof to the defendant.

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4. The first issue is not mentioned in either the questions presented in the petition for certiorari or this Court's restatement of question 1 in the order granting certiorari.

In *Engle*, the defendants claimed self-defense. The juries had been instructed, without objection, that the defense had the burden of proof. The Ohio Supreme Court later decided, as a matter of statutory interpretation, that the prosecution had the burden of proof, 456 U. S., at 111, but upheld its state procedural bar against defendants who had not objected at trial, *id.*, at 116. Isaac and the others contended on federal habeas that regardless of the interpretation of the statute "Ohio could not constitutionally shift the burden of proving self-defense to them." *Id.*, at 121.

Isaac put forth precisely the same reasons for default which Selvage proffers in the present case: novelty and futility. *Id.*, at 130. The Court dealt with futility in no uncertain terms. Futility "*cannot* alone constitute cause . . . . " *Id.*, at 130 (italics added). No matter how solid the wall of authority, the state court *must* be presented with the opportunity to overrule that authority before that argument can be the basis of a federal claim that the prisoner is unconstitutionally detained.

While Isaac's claim of novelty was also rejected, that rejection was not categorical. *Id.*, at 131. The test adopted was whether the tools to construct the constitutional claim were available to the defense. *Id.*, at 133. The necessary tool had been provided years before the trial by *In re Winship*, 397 U. S. 358 (1970). *Engle*, at 131.

To evaluate this "tools" test, it is important to recognize how broad a gap exists between *Winship* and Isaac's claim. The holding of *Winship* is "that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *Winship*, 397 U. S., at 364. Isaac did not deny that he had knowingly caused serious physical harm to another, the facts constituting the crime. *Engle*, at 114, n. 12. His defense was that his actions were justified by self-defense. *Id.*, at 114. There is an important difference

between requiring the state to prove the offense and requiring it to disprove a defense. *Martin* v. *Ohio*, 480 U. S. 228, 231-234 (1987) explains this difference at length.

For an earlier case to have provided the tools to construct a claim, then, the claim need not follow directly or inevitably from that case. Reasonable people may differ as to whether the case supports the claim. There may be contrary precedent on point. See *Engle*, 456 U. S., at 133, n. 41.

The claim need not be so obvious that every competent attorney raises it. If significant numbers of lawyers are making the claim, even though many or most are not, then the tools exist. In that event, there is no "cause" for not raising the claim. *Id.*, at 133-134.

In *Reed* v. *Ross* 468 U. S. 1 (1984), the jury in a murder case was instructed that use of a gun raises a presumption of malice shifting the burden of proof to the defendant. *Id.*, at 6-7. The argument against this instruction would seem on its face to be considerably *less* novel than the argument advanced in *Engle*. Malice is traditionally an element of murder to be proved by the prosecution, while self-defense is the kind of affirmative defense which many jurisdictions have required the defendant to prove. See 1 W. LaFave and A. Scott, Substantive Criminal Law § 1.8(c), 71-78 (1986). The *Reed* court distinguished *Engle* by the fact that the trial in *Reed* had occurred before *Winship*. *Reed*, 468 U. S., at 19-20.

Novelty will constitute cause "where a constitutional claim is so novel that its legal basis is not reasonably available to counsel." *Id.*, at 16. The most common instance of a claim without a pre-existing "reasonable basis" is where "this Court has articulated a constitutional principle that had not been previously recognized *but which is held to have retroactive application*." *Id.*, at 17 (italics added). *Reed* then equates "not previously recognized" with the "clear break with the past"

test. *Ibid.* This "clear break" language is taken from *United States* v. *Johnson*, 457 U. S. 537 (1982), where the Court indicated that "clear break" cases are "decisions whose nonretroactivity is effectively preordained." *Id.*, at 553-54.

Reed then identifies three categories of clear breaks, still relying on *Johnson*. The simplest and most obvious is a decision of the Supreme Court overruling one of its own precedents. 468 U. S., at 17. "Second, a decision may 'overtur[n] a longstanding and *widespread* practice to which this Court has not spoken, but which a *near-unanimous* body of lower court authority has expressly approved.' " *Ibid.*, quoting *Johnson* (italics added). These two categories should cause little difficulty for reasons we will explain below.[5]

The principal problem lies in the third category, where a "decision may 'disapprov[e] a practice this Court *arguably* has sanctioned in prior cases.' " *Ibid.*, quoting *Johnson* (italics added). This is a very vaguely defined category. Given the volume of this Court's opinions, the divergence of views among its Members and the creativity of lawyers in extrapolating from opinions, a vast array of practices might be said to have been *arguably* sanctioned.

The test of novelty applied to this category is even more vague.

> "Whether an attorney had a reasonable basis for pressing a claim challenging a practice that this Court has arguably sanctioned depends on how direct this Court's sanction of the prevailing practice had been, how well entrenched the practice was in the relevant jurisdiction at the time of defense counsel's failure to challenge it, and how strong the available support is

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5. See part IV A at p. 11, *infra*.

from sources opposing the prevailing practice." *Id.*, at 17-18.

The litigation-breeding potential of this test is apparent. It bears more than a passing resemblance to the "test" for retroactivity which this Court has since abandoned as unworkable. See *Teague* v. *Lane*, 109 S. Ct. 1060, 1070-1072, 103 L. Ed. 2d 334, 350-352 (criticism of the *Linkletter* standard).

The threads of retroactivity are woven throughout the fabric of *Reed* v. *Ross*. They show clearly in all three of the opinions filed in that case. The *Reed* majority noted that retroactivity was a distinguishing characteristic of the primary category of cases to which its rule applied. *Reed, supra*, 468 U. S., at 17. The majority also lifted its "clear break" test directly out of retroactivity law. *Ibid.*

Justice Powell rested his deciding vote on the state's own procedural default in not raising the retroactivity issue. *Id.*, at 20. Had the state only raised the issue, *Reed* would have gone the other way.

The dissent noted the paradoxical result of considering "novelty" as "cause" without considering retroactivity:

> "Consequently, we have the anomalous situation of a jury verdict in a case tried properly by then-prevailing constitutional standards being set aside because of legal developments that occurred long after the North Carolina conviction became final.
>
> • • •
>
> "Like the Court of Appeals, the Court proposes to adopt 'novelty' as a possible form of 'cause' under *Wainwright* v. *Sykes* to justify ignoring the State's procedural default rule. But this equating of novelty with cause pushes the Court into a conundrum which it refuses to recognize. The more 'novel' a claimed constitutional right, the more unlikely a violation of that

> claimed right undercuts the fundamental fairness of the trial." *Id.*, at 21-22 (Rehnquist, J., dissenting).

The correction to the anomaly and the solution to the conundrum, we submit, is to *always* consider retroactivity with any *Reed* claim. When this is done within the structure of *Teague* v. *Lane*, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989), the difficulties anticipated by the *Reed* dissent disappear, and the question of fundamental fairness will become central to the decision.

III. New procedural rules are almost never retroactive on habeas under *Teague*.

The essence of a habeas petitioner's *Reed* claim is that the law has changed in an unexpected way and that he should not be "punished" for a lack of clairvoyance. But are the people of a state not entitled to make the same claim? Should a judgment that was perfectly legal when entered be set aside because a court did not follow a procedure which it had no obligation to follow at the time? The people's side of the unexpected change ledger is the issue of retroactivity. The crux of this case is the inconsistency between defendant's claim of novelty and the holding of *Penry* v. *Lynaugh*, 109 S. Ct. 2934, 106 L. Ed. 2d 256 (1989) on the retroactivity question.

Teague v. *Lane*, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989)[6] is the culmination of this Court's long and difficult struggle with the question of how far back a new decision should reach in undoing the work of judges, lawyers and juries who had duly obeyed the rules in effect at the time. Whenever a rule is not applied retroactively, the contention is made that the Court

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6. *Teague* is a plurality opinion, but its rule was accepted by a majority in *Penry* v. *Lynaugh*, 109 S. Ct. 2934, 2944, 106 L. Ed. 2d 256, 274 (1989).

has sanctioned a constitutionally flawed conviction or denied someone his constitutional rights. See, *e.g.*, *Johnson* v. *New Jersey*, 384 U. S. 719, 736 (1966) (Black, J., dissenting). That would be true if one subscribed to the Blackstonian belief that the Court merely discovers pre-existing law and does not make new law. See 1 W. Blackstone, Commentaries 69-70 (1765). However attractive the Blackstone approach may be in theory, it loses any connection with reality when applied to requirements as far removed from the text and history of the Constitution as the *Miranda* warnings, the exclusionary rule or the rule of *Lockett* v. *Ohio*, 438 U. S. 586 (1978).

There are, no doubt, people in prison today who were convicted before *Miranda* v. *Arizona*, 384 U. S. 436 (1966) based largely on voluntary confessions obtained without the now-required warnings. Yet their continued incarceration is not the result of any denial of any constitutional right. The prisoner was legally convicted because the right to warnings simply did not exist at the time; this Court created that right in *Miranda*. There may be doubts about the legitimacy of creating "constitutional" rights so far removed from either the text or fundamental fairness, see *Rose* v. *Lundy*, 455 U. S. 509, 543-544, n. 8 (1982) (Stevens, J., dissenting), but no realistic appraisal can deny that that is what the *Miranda* Court actually did.

With the recognition that some rules are genuinely "new" came a need to decide how far back to apply these new rules. A three-part test to be applied separately to each new rule was laid down in *Linkletter* v. *Walker*, 381 U. S. 618 (1965) and *Stovall* v. *Denno*, 388 U. S. 293, 297 (1967). This test was heavily dependent on the value judgments of the judges applying it, however, and application of it was inconsistent. See *Teague*, *supra*, 109 S. Ct., at 1072, 103 L. Ed. 2d, at 352.

In *Griffith* v. *Kentucky*, 479 U. S. 314 (1987) and *Teague* v. *Lane*, *supra*, the *Linkletter-Stovall* approach was replaced by

the approach suggested by Justice Harlan in *Desist* v. *United States*, 394 U. S. 244, 256-269 (1969) (dissent) and *Mackey* v. *United States*, 401 U. S. 667, 675-702 (1971) (separate opinion). All new rules now apply to all cases on direct review, *Griffith*, 479 U. S., at 323, and with two rare exceptions do not apply to cases which became final prior to the announcement of the rule, *Teague*, 109 S. Ct., at 1075, 103 L. Ed. 2d, at 356.

The first step in a *Teague* analysis is to determine whether a rule is "new." "In general . . . a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government." *Id.*, at 1070, L. Ed. 2d, at 349. The examples given illuminate the meaning of this sentence. *Rock* v. *Arkansas*, 483 U. S. 44 (1987) broke new ground by extending the right to present a defense, established in *Chambers* v. *Mississippi*, 410 U. S. 284 (1973), into the previously uncharted territory of hypnotically refreshed testimony. *Ford* v. *Wainwright*, 477 U. S. 399 (1986) imposed a new obligation on the states by constitutionalizing the long-established common-law prohibition of execution of the insane. Neither claim was novel. *Chambers* and the common law provided ample tools to construct the respective claims. Yet both are "new rules" under *Teague*.

The *Teague* Court's alternative formulation of newness is more emphatic. "To put it differently, a case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final." 109 S. Ct., at 1070, 103 L. Ed. 2d, at 349 (italics in original). Because no precedent existing at that time could be said to dictate that the fair cross-section requirement extended to the petit jury, such an extension would be a new rule. *Ibid.*

Penry v. *Lynaugh*, 109 S. Ct. 2934, 106 L. Ed. 2d 256 (1989) presented an unusual twist on the newness problem. The difficulty in the question presented in *Penry* was not caused by a dearth of authority but rather by an excess. A tension exist-

ed between two lines of cases decided by this Court, see *California* v. *Brown*, 479 U. S. 538, 544 (1987) (O'Connor, J., concurring), and either side could construct a reasonable argument using one of the two lines.

In *Woodson* v. *North Carolina*, 428 U. S. 280, 304 (1976), a plurality held that capital sentencing must take into account relevant facets of the defendant's character and record, including "compassionate or mitigating factors stemming from the diverse frailties of humankind." In *Lockett* v. *Ohio*, 438 U. S. 586, 604 (1978), the plurality found a constitutional requirement that "the sentencer . . . not be precluded from considering *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."[7] *Eddings* v. *Oklahoma*, 455 U. S. 104, 110 (1982) raised the *Lockett* plurality rule to majority status.

Taking these authorities alone, the *Penry* case would have been a foregone conclusion. Asking the jurors to decide if the murder was deliberate, if the defendant will be dangerous in the future and if the defendant overreacted to any provocation did not permit consideration as mitigation of Penry's abused childhood, precisely the type of mitigation that *Eddings* had held must be considered. 455 U. S., at 113-115. The problem was that the Texas system of asking only these three questions had been sustained against a facial attack in *Jurek* v. *Texas*, 428 U. S. 262 (1976). Four Justices of this Court believed that *Jurek* and not *Eddings* dictated the result. *Penry*, 109 S. Ct., at 2965, 106 L. Ed. 2d, at 300 (Scalia, J., dissenting in part).

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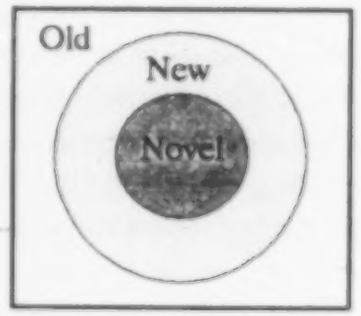
7. Italics in original. A footnote at this point reserves the life prisoner question subsequently decided in *Sumner* v. *Shuman*, 483 U. S. 66 (1987).

The "newness" issue in *Penry* and the merits of the decision thus both turn on the interpretation of *Jurek*. *Penry* says that *Jurek* did not give a blanket endorsement to the Texas manner of instructing the jury without regard to whether those instructions permitted consideration of all mitigating evidence proffered in a particular case. Rather, says *Penry*, *Jurek* was based on an assurance, not fulfilled in Penry's case, that all such evidence would be considered. *Id.*, at 2946-2947, L. Ed. 2d, at 278. If *Penry* is new then it is also wrong on the merits.[8] If *Penry* is correct on the merits, then its interpretation of *Jurek* must also be correct. *Penry* therefore does not "gut" *Teague*, see *id.*, at 2965, L. Ed. 2d, at 301 (Scalia, J., dissenting in part), but rather leaves it untouched. A rule is new if it is not dictated by prior precedent. Accepting the *Penry* majority's interpretation of *Jurek*, *Penry* is indeed dictated by *Lockett-Eddings*.

IV. Any claim which is "novel" under *Reed* is necessarily "new" under *Teague*.

A. The Basic Rule of Preclusion.

When the definition of "new rules" is juxtaposed with the definition of "novel claims" we can see that "novel" is a subset of "new." That is, any claim which is "novel" under *Reed* must necessarily be "new" under *Teague*, at least if newness and novelty are determined as of the same time. The converse, however, is not necessarily true. Most claims will cease to be novel under *Reed* long before the rules they propose cease to be new under *Teague*.



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8. Defendant's interpretation of *Jurek*, Pet. Brief 57-58, is essentially the same as that of the *Penry* dissent.

Returning to the three categories of potentially novel claims outlined in *Reed* v. *Ross*, 468 U. S. 1, 17 (1984), the first category is a square overruling by this Court of one of its own precedents. While *Reed* correctly notes that a claim based on the overruling case would be novel, *ibid.*, there can also be no doubt that such a claim would be new under *Teague*. See *Teague*, 109 S. Ct., at 1067, 103 L. Ed. 2d, at 345-346 (reaffirming nonretroactivity on habeas of *Batson* v. *Kentucky*, 476 U. S. 79 (1986)).

The second category requires that the disapproved practice had been both longstanding and widespread and had been approved by a nearly unanimous body of lower court opinion. *Reed*, at 17. Again, there can be no question that the disapproval of such a body of case law would be a new rule under *Teague*.[9]

The present case fits in the third category: disapproval of a practice arguably sanctioned by past Supreme Court cases. *Ibid.* The prior sanction of the disapproved practice is certainly arguable if the argument was accepted by four Justices of this Court, see *Penry* v. *Lynaugh*, 109 S. Ct. 2934, 2965-2967, 106 L. Ed. 2d 256, 301-303 (1989) (Scalia, J., dissenting in part). Yet arguable sanction alone is not enough for novelty. *Reed* also considers directness of the sanction, entrenchment of the practice in the relevant jurisdiction and strength of available support for opposing the practice.

Comparing *Reed* with *Engle* v. *Isaac*, 456 U. S. 107 (1982), it is apparent that the entrenchment factor cannot alone make a claim novel. *Engle* held that even complete futility cannot alone constitute cause, *id.*, at 130, and this holding was reaffirmed after *Reed* in *Smith* v. *Murray*, 477 U. S. 527, 535

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9. The present case does not fall into this category, as the Texas practice is not widespread. Defendant says it is unique. Pet. Brief 65.

(1986). *Reed* also considers the directness of this Court's sanction of the practice, but if the sanction were truly direct the case would fall into the first category (outright overruling) and not the third.

The principal focus, then, must be on "how strong the available support is from sources opposing the prevailing practice." *Reed*, 468 U. S., at 17-18. This focus is consistent with *Engle* and *Smith*, because the basic question is whether defense counsel had the tools to construct the claim, *Engle*, 456 U. S., at 133, not whether the prosecution had the tools to tear it down. Here the inconsistency of the defense's position becomes glaring.

If a rule is *dictated* by existing precedent of the Supreme Court, then the available support from opposing sources is not merely "strong"; it is by definition overpowering. A finding that the rule is not new under *Teague* thus establishes the strength factor of *Reed* to such a degree that it necessarily overrides the other two factors. How can anyone say that a result is dictated by precedents of the Supreme Court and yet maintain that counsel lacks the tools to construct that claim?

The argument to that effect really should be written by Lewis Carroll, but defense counsel turns in a reasonable impersonation. For evaluating whether a rule is new under *Teague*, the argument goes, this Court should interpret its prior opinions in the way it has in the past, but for the *Reed* novelty evaluation the Court should jump through the looking-glass into a reversed world where all the rules are different. See Pet. Brief 76-79. Legal practitioners immersed in the local system, we are told, are somehow excused from reading and understanding this Court's precedents. See *id.*, at 79.

The argument just does not hold water. Whatever deficiencies American legal education may have in other respects, it does teach lawyers to do one task very well: to read, under-

stand and interpret appellate decisions. We all read the same cases. Law school has made sure we know how. There is no justification for the double standard defendant proposes.

Penry's holding that its rule is not "new" for *Teague* precludes the contention that the claim is "novel" for *Reed*. Conversely, a finding of novelty would require that *Penry* be fully or partially overruled and that the rule established in that case either overturned or at least not applied to any sentence which became final before June 26, 1989. Either way, defendant cannot claim the benefit of *Penry*.

B. The Timing Exception.

There is one exception worth noting to the general rule of preclusion. Novelty for *Reed* and newness for *Teague* are not determined as of the same time. *Reed* looks at the time of the procedural default, 468 U. S., at 13, while *Teague* looks to the date the conviction became final, 109 S. Ct., at 1075, 103 L. Ed. 2d, at 356. It is remotely possible that the law could take such a radical turn in the interim that a claim which was unavailable at the time of the default had become dictated by precedent by the date of finality.

This possibility need not detain the Court in the present case, because no such radical turn in the law occurred between the 1980 trial and the 1984 finality. The plurality opinion in *Lockett* v. *Ohio*, 438 U. S. 586 (1978) provided the tools to construct the claim in 1980, and Penry's lawyer used them to do exactly that. See *Penry* v. *Lynaugh*, 109 S. Ct. 2934, 2942, 106 L. Ed. 2d 256, 273 (1989); see also *Quinones* v. *State*, 592 S. W. 2d 933, 947 (Tex. Crim. App. 1980), cert. denied, 449

U. S. 893.[10]

Between trial and finality, the only important development was the elevation of the *Lockett* plurality rule to majority status in *Eddings* v. *Oklahoma*, 455 U. S. 104 (1982). The distinction between a plurality and a majority is important for determining when a rule is dictated by existing precedent,[11] but it is not important for deciding whether counsel had the tools to construct the claim. No competent lawyer would abandon a claim based on a decision of the Supreme Court merely because it was a plurality decision. In the death penalty area especially, most of this Court's jurisprudence has started out as plurality decisions. See generally, Scheidegger, Capital Punishment in 1987: The Puzzle Nears Completion, 15 West. St. L. Rev. 95, 107-110 (1987). Furthermore, *Lockett* contains a solid majority on the need to consider Selvage's principal mitigating factors of accomplice status and lack of intent to kill. See *Lockett*, 438 U. S., at 615-616 (Blackmun, J., concurring in the judgment).

C. Fundamental v. Nonfundamental Rules.

If a rule must necessarily be new in order to be novel, two difficulties anticipated in *Reed* vanish. The *Reed* dissent noted that "novel" claims were unlikely to affect the fundamental fairness of the trial, 468 U. S., at 22 (Rehnquist, J., dissenting), but a novel procedural claim can now apply on habeas *only* if it

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10. Selvage's trial and Penry's took place in February and March, respectively, of 1980. J. A. 8; 109 S. Ct., at 2941, 106 L. Ed. 2d, at 271. *Quinones* was decided in January but did not become final until denial of certiorari in October. The issue was very much alive at the time of Selvage's trial.

11. Defendant assumes that *Lockett* and not *Eddings* is the cut-off date for application of the *Penry* rule. Pet. Brief 76. Amicus disagrees, but this case does not present that question.

qualifies for the second *Teague* exception; it must involve on "absolute prerequisite to fundamental fairness" the absence of which "seriously diminish[es] the likelihood of obtaining an accurate conviction." *Teague* v. *Lane*, 109 S. Ct. 1060, 1077, 103 L. Ed. 2d 334, 358-359 (1989). *Substantive* claims that an act cannot be punished at all qualify for the other exemption. *Id.*, at 1073, L. Ed. 2d, at 353. Thus, the novel but peripheral claims anticipated by the dissent are excluded.

On the other hand, the *Reed* majority was concerned that refusal to recognize novelty as cause would result in defense counsel inundating the trial court with "any and all remotely plausible constitutional claims that could, some day, gain recognition." *Reed*, 468 U. S., at 15-16. If a claim of error is so fundamental as to qualify for the second *Teague* exception, competent counsel will surely raise it to preserve it for appeal, regardless of what rules may apply on habeas. If the claimed error is not so fundamental, *Teague* has eliminated any incentive to object merely to preserve the claim for habeas.

The interaction of the procedural default rule and the *Teague* nonretroactivity rule thus form another step in the evolution of habeas corpus. That evolution, in recent years, has begun to move away from relitigation *ad infinitum* of the detailed code of criminal procedure now deemed to be incorporated in the Due Process Clause, see [illegible]dly, Is Innocence Irrelevant? Collateral Attack on Criminal [illegible]dgments, 38 U. Chi. L. Rev. 142, 155-156 (1970), and toward a focus on fundamental fairness and actual innocence. *Teague* removed retroactivity for nonfundamental procedural claims. *Stone* v. *Powell*, 428 U. S. 465 (1976) eliminated most of the exclusionary rule claims. Some Members of the Court would go further. See *Rose* v. *Lundy*, 455 U. S. 509, 547 (1982) (Stevens, J., dissenting) (eliminate nonfundamental claims altogether); *Duckworth* v. *Eagan*, 109 S. Ct. 2875, 2881, 106 L. Ed. 2d 166, 179 (1989) (O'Connor, J., concurring) (eliminate *Miranda* claims).

Murray v. *Carrier*, 477 U. S. 478, 496 (1986) recognized the importance of actual innocence.

Recognition of the rule amicus proposes would be a significant step along this path. Claims of fundamental unfairness raising serious doubt of the guilt of the accused could go forward under *Reed* regardless of procedural default, but peripheral claims dreamed up only after a defendant's main contentions have failed would always be barred by either the procedural default rule or the nonretroactivity rule.

D. Procedural Default v. "Merits."

Because debate on the procedural default rule usually invokes calls to forget procedure and go to the "merits," a few words on that point may be in order. Although the procedural default rule is based on the procedure at trial and on appeal, it *does* go to the merits of the habeas petition. A habeas proceeding is not an appeal. *United States* v. *Frady*, 456 U. S. 152, 165 (1982). It is a civil lawsuit by a prisoner against officers of the state, accusing them of violating the Constitution, laws or treaties of the United States. 28 U. S. C. § 2254(a); *Hilton* v. *Braunskill*, 481 U. S. 770, 776 (1987). The state is no longer accusing the petitioner; that proceeding is over and final. The petitioner is accusing the state. That is why he has the burden of proof. See *Johnson* v. *Zerbst*, 304 U. S. 458, 468-469 (1938).

The procedural default rule is not a forfeiture or penalty imposed on the accusing petitioner; it is an affirmative defense afforded to the accused state. Virtually all federal habeas claims today are ultimately based on the requirement that a state not "deprive any person of life, liberty, or property, without due process of law." U. S. Const. amend. XIV, § 1. This clause, along with all that is deemed incorporated in it, does not require state trial judges to scrutinize their procedures *sua sponte* for every creative challenge that might some day find

favor with this Court. The state may properly place the burden of raising most objections on the defendant.

If the defendant has been provided with an effective attorney, if the trial is conducted in accordance with the bedrock elements of procedural fairness which are central to an accurate determination of guilt,[12] and if the trial judge and appellate court rule correctly on all objections made by the defense,[13] then the officials of the state have done their job correctly. That being the case, the fundamental element of the habeas petitioner's cause of action is missing. He has received the process due. His custody is not in violation of the Constitution of the United States. The state court's "error" in not sustaining an objection which the defendant *never made* does not alter that conclusion. A ruling on the procedural bar *is* thus a ruling on the merits of the habeas petition.

E. Conclusion.

A claim ceases to be novel under *Reed* v. *Ross*, 468 U. S. 1 (1984), at the very latest, when it ceases to be new under *Teague* v. *Lane*, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989). In most cases it will have ceased to be novel long before. Absent a radical shift in the law between the date of default and the date of finality, a holding that a rule is not new under *Teague* absolutely precludes any contention that a claim under that rule is novel under *Reed*. A rule which is new under *Teague*, and therefore potentially novel under *Reed*, is retroactive on habeas corpus only in two rare circumstances not present in

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12. If not, the second *Teague* exception applies. See 109 S. Ct., at 1076, 103 L. Ed. 2d, at 357. Furthermore, failure to object to a *fundamentally* unfair procedure in any modern trial would be ineffective assistance.

13. A "correct" ruling is one made in accordance with the precedents established by this Court as of the date of finality.

this case. *Teague*, 109 S. Ct., at 1075-1077, 103 L. Ed. 2d, at 356-358.

Penry v. *Lynaugh*, 109 S. Ct. 2934, 106 L. Ed. 2d 256 (1989) therefore cannot be the basis for overturning Selvage's sentence. He failed to raise the objection at trial, and his claimed excuse for not objecting is irreconcilable with the holding of *Penry* that the rule in that case applies to cases which became final after *Eddings* v. *Oklahoma*, 455 U. S. 104 (1982) but before *Penry*.

V. "Fundamental miscarriage of justice" must be based on substance, not procedure.

Where the verdict itself is correct, *i.e.*, the defendant is actually guilty, there is nothing unfair about a procedural bar blocking a claim which is itself procedural. In *Engle* v. *Isaac*, 456 U. S. 107, 135 (1982), this Court expressed its confidence that "victims of a fundamental miscarriage of justice will meet the cause-and-prejudice standard." In *Murray* v. *Carrier*, 477 U. S. 478, 496 (1986), the Court recognized that there might be extraordinary cases "where a constitutional violation has probably resulted in the conviction of one who is actually innocent," and recognized actual innocence as a separate exception to the procedural bar rule, independent of the cause and prejudice test.

The difficulty comes in applying this exception to capital sentencing where guilt is not in issue. In *Smith* v. *Murray*, 477 U. S. 527 (1986), the purported error had to do with the defendant's admission of prior misconduct during a psychiatric interview arranged by his own attorney. *Id.*, at 529-530. Acknowledging the difficulty of translating actual innocence into the penalty phase, the Court concluded that the admission of the evidence "did not serve to pervert the jury's deliberations concerning the ultimate question whether *in fact* peti-

tioner constituted a continuing threat to society." *Id.*, at 538 (italics in original).

The intended emphasis in this statement appears to be on the jury's reaching an acceptable result based on all of the information available, even though some of that information may have been illegally obtained. The reference to perverting the jury's deliberations, however, might be construed to open up any claim of procedural error in instructing the jury, selecting the jury or arguing to the jury.

The latter interpretation was adopted by the dissent in *Dugger* v. *Adams*, 109 S. Ct. 1211, 103 L. Ed. 2d 435 (1989). Adams was sentenced to death for molesting and murdering an eight-year-old girl. *Id.*, at 1213, n. 2, L. Ed. 2d, at 441, n. 2. The trial court instructed the jury that their recommendation was only advisory. *Id.*, at 1213, L. Ed. 2d, at 440. The dissent claimed that this "alleged error is thus global in scope: it necessarily pervades the entire sentencing process." *Id.*, at 1224, L. Ed. 2d, at 453 (Blackmun, J., dissenting).

The *Adams* majority, however, rejected this process-based approach to fundamental miscarriage of justice.

> "Demonstrating that an error is by its nature the kind of error that might have affected the accuracy of a death sentence is far from demonstrating that an individual defendant probably is 'actually innocent' of the sentence he or she received. The approach taken by the dissent would turn the case in which an error results in a fundamental miscarriage of justice, the 'extraordinary case,' *Carrier*, *supra*, at 496, into an all too ordinary one." *Id.*, slip op. at 11, n. 6, S. Ct., at 1218, L. Ed. 2d, at 446.

This passage tells us what fundamental miscarriage of justice is not, but regrettably does not tell us what it is. The answer, amicus submits, is to look solely at the substance of

the result, disregard all procedure and resolve all discretionary questions in favor of the verdict. By doing so, we can expose those injustices which are truly fundamental while restraining judicial interference based on disagreement with the sentencer or the legislature.

For guilt phase error the test of fundamental miscarriage of justice is actual innocence. Why? Because *everyone* agrees that throwing an innocent man in prison is an injustice. There are no questions of policy here. There is no room for discretion. The purpose of our judicial system is to convict and punish the guilty. No rational person believes we should convict the innocent.

An injustice is *fundamental*, justifying an exception to the procedural bar rule, when there is near unanimity among the American people that people in the petitioner's situation should not receive the punishment. On the other hand, a sentence is not a miscarriage of justice at all, much less a fundamental one, if the sentence is a legal one for the crime committed and if a reasonable sentencer might well impose that sentence for that crime.

The perimeter of authorized capital sentencing has been staked out by this Court with great care and with explicit reference to the beliefs of the American people. See *Stanford* v. *Kentucky*, 109 S. Ct. 2969, 2975-2976, 106 L. Ed. 2d 306, 318-319 (1989). Death is not a permissible sentence for rape, *Coker* v. *Georgia*, 433 U. S. 584, 592 (1977) (plurality), and presumably not for other nonfatal crimes against individuals. Crimes against sovereignty, such as treason and espionage, have yet to be considered. Death is also not permissible in the case of a nontriggerman without either intent to kill, *Enmund* v. *Florida*, 458 U. S. 782, 797 (1982), or major participation plus reckless disregard for life, *Tison* v. *Arizona*, 481 U. S. 137, 157-158 (1987). Several groups are immune from capital punishment: the insane, *Ford* v. *Wainwright*, 477 U. S. 399 (1986);

persons under 16, at least without a legislatively-set minimum age, *Thompson* v. *Oklahoma*, 108 S. Ct. 2687, 101 L. Ed. 2d 702 (1988); and probably the severely or profoundly retarded, see *Penry* v. *Lynaugh*, 109 S. Ct. 2934, 2954, 106 L. Ed. 2d 256, 287 (1989).

This extensive set of restrictions, combined with the state statutory system, defines which murderers are death-eligible. If the defendant is *in fact* a murderer, if his crime does *in fact* fit the state's definition of a capital offense, and if neither he nor his crime *in fact* comes within any of the excluded classes above, then death is an authorized sentence which our society has determined to be not cruel and not grossly disproportionate. This detailed and exhaustive body of law, built up so painfully over so many years, has identified and excluded those cases where a death sentence would be a fundamental miscarriage of justice. The remainder of cases are those where reasonable people may differ as to whether death is the appropriate punishment.[14] If a particularly hard-nosed sentencer could legitimately impose the sentence following an absolutely perfect trial and sentencing hearing, then that sentence is not a fundamental miscarriage of justice.

The present case illustrates the point. Giving Selvage the benefit of the doubt, we will assume that his accomplice, Kelly, was the "triggerman" in both killings. See Pet. Brief 30-31, n. 16. By Selvage's own admission, then, he robbed the convenience store, and in the course of that robbery Kelly shot and killed an innocent customer. A mere four days later, with the actual knowledge that Kelly is a "wild man" who shoots people

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14. The overwhelming majority of the American people favor capital punishment for murder, including an absolute majority in *every* demographic group surveyed. U. S. Bureau of Justice Statistics, Sourcebook of Criminal Justice Statistics — 1988 at 223. Twenty-nine percent favor it in *all* murder cases, and eleven percent oppose it in all cases. *Id.*, at 230.

in the course of his robberies, Selvage committed another robbery with Kelly. Both of them were armed, and Selvage personally fired his gun at a person. Pet. Brief at 6.

Although Selvage's accomplice status is relevant, his degree of participation and resulting culpability are far greater than Earl Enmund's, see *Enmund* v. *Florida*, 458 U. S. 782, 784-785 (1982) or Sandra Lockett's, see *Lockett* v. *Ohio*, 438 U. S. 586, 590-591 (1978). Selvage's personal act of shooting at Mr. Ventura makes his participation and his reckless disregard for life greater than that of the Tison brothers in *Tison* v. *Arizona*, 481 U. S. 137, 139-141 (1987).

In addition to his accomplice status and his mens rea (extreme recklessness rather than intent), defendant relies heavily on his psychiatric testimony. Pet. Brief 21-27. If Selvage were genuinely insane then his execution would be a fundamental miscarriage of justice. "Mental illness short of that," as defendant characterizes it, Pet. Brief 108, is a very different matter. The sentence would still be well within the discretion of the sentencer, and a great many people would give little or no mitigating weight to the psychiatric testimony. The trial judge seems to have been particularly unimpressed with the psychiatrist. See J. A. 33.

In summary, then, defendant's contention that he does not deserve his sentence is merely an opinion with which a great many reasonable people would disagree. Many of them would consider any lesser sentence to be a miscarriage of justice. In light of the expansion of the excluded classes in *Thompson* and *Penry*, *supra*, and the very substantial support for capital punishment for all murders, see note 14, *supra*, this will be true any time the crime and the defendant do not fall into any of

the excluded classes described above.[15]

A habeas petitioner is "actually innocent" of a death sentence if, considering all available facts, the sentence was not legally within the discretion of the sentencer to impose. Selvage's sentence was well within the sentencer's discretion, and therefore it is not a fundamental miscarriage of justice.

Conclusion

The decision of the Court of Appeals for the Fifth Circuit should be affirmed.

Dated: December, 1989

Respectfully submitted,

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Criminal Justice Legal Foundation

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15. At one time, counsel for amicus proposed a "no rational person could differ" standard. Cf. *Jackson* v. *Virginia*, 443 U. S. 307, 313 (1979). After observing the misapplication of the harmless error rule in capital cases, see, *e.g.*, *Bowen* v. *Kemp*, 832 F. 2d 546, 553 (11th Cir. 1987) (Fay, J., dissenting), *id.*, at 554 (Edmondson, J., dissenting), it appears that such an indefinite rule offers too much temptation for those inclined to second-guess the sentencer.